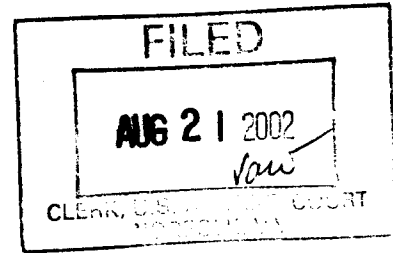


IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION



**YASER ESAM HAMDI, and
ESAM FOUAD HAMDI,
As Next Friend of Yaser Esam Hamdi,**

Petitioners,

v.

CIVIL ACTION NO. 2:02cv439

**DONALD RUMSFELD, and
COMMANDER W.R. PAULETTE,**

Respondents.

CERTIFICATION ORDER AND STAY

This Court certifies the following question to the Fourth Circuit Court of Appeals pursuant to 28 U.S.C. § 1292(b).

Certified Question: Whether the Mobbs Declaration, standing alone, is sufficient as a matter of law to allow a meaningful judicial review of Yaser Esam Hamdi's classification as an enemy combatant?

Certification of this question is appropriate because it involves a controlling question of law as to which there is substantial ground for difference of opinion, and an immediate appeal from this Court's August 16, 2002, Order may materially advance the ultimate termination of this litigation.

The Court **STAYS** the deadline for compliance with its August 16, 2002, production Order until five (5) days after the Court of Appeals for the Fourth Circuit either declines jurisdiction over the appeal or issues a ruling on the certified question.

Procedural History

On May 10, 2002, the Federal Public Defender for the Eastern District of Virginia, Frank Dunham, filed a habeas corpus petition, naming as petitioners both Yaser Esam Hamdi and himself

4

49

as Hamdi's next friend. After holding a hearing on May 29, 2002, this Court concluded that the habeas corpus petition was properly filed and ordered that Hamdi be allowed to meet with the Federal Public Defender on June 1, 2002. On May 31, 2002, the Respondents filed a motion in the Court of Appeals for the Fourth Circuit for a stay pending appeal of this Court's access order on the grounds that there was an insufficient relationship between Hamdi and the Federal Public Defender. The Court of Appeals granted the Respondents' Motion.

While the Federal Public Defender's petition was submitted to the appeals court, Esam Fouad Hamdi, the detainee's father, filed a separate petition for a writ of habeas corpus naming as petitioners both Yaser Esam Hamdi and himself as next friend. On June 11, 2002, this Court found that Hamdi's father had properly filed his habeas petition as next friend, appointed the Federal Public Defender as counsel for Petitioners, and ordered the Respondents to allow counsel access to Hamdi. The Respondents then filed a motion for stay in the Court of Appeals for the Fourth Circuit pending appeal of the June 11, 2002, Order. On June 14, 2002, the Court of Appeals granted the Respondents' Motion for a stay of this Court's June 11, 2002, Order and further ordered a stay of all proceedings before this Court in connection with Hamdi.

On June 26, 2002, the appellate court dismissed the petition brought by Frank Dunham finding an insufficient relationship between Mr. Dunham and the detainee. Hamdi v. Rumsfeld, No. 02-6827, slip op. at 2 (4th Cir. June 26, 2002). The appeals court further held that Hamdi's father had a sufficient relationship with Hamdi and had filed a valid next friend petition. See id. at 3 n.1.

On July 12, 2002, the Court of Appeals ruled on the Respondents' Appeal regarding this Court's June 11, 2002, access Order. Hamdi v. Rumsfeld, No. 02-6895, 2002 WL 1483908 (4th Cir. July 12, 2002). In their appeal, the Respondents argued that the habeas petition should be dismissed

in its entirety, or alternatively, the case should be reversed and remanded to this Court for further proceedings. The appeals court declined to dismiss the petition, finding that such dismissal would be premature. Id. at *5. Instead, the Court of Appeals reversed this Court's June 11, 2002, Order and remanded the case for further proceedings. Id. at 2. In reversing, the appellate court held that this Court failed to extend to the political branches the appropriate deference in matters of foreign policy and national security. Id. at *3. The appellate court then directed this Court to consider "the most cautious procedures first, conscious of the prospect that the least drastic procedures may promptly resolve Hamdi's case and make more intrusive measures unnecessary." Id. at *5-6.

On August 8, 2002, the Court of Appeals for the Fourth Circuit dissolved its stay order of June 14, 2002. In doing so, the appeals court stated "that the district court may proceed in strict compliance with our July 12, 2002 decision." August 8, 2002, Order at 1. The Court of Appeals further directed this Court to "consider the sufficiency of the Mobbs Declaration as an independent matter before proceeding further." Id. at 2.

In response, this Court analyzed the Mobbs Declaration, considered briefs submitted from both the Respondents and the Federal Public Defender, and heard oral argument on August 13, 2002, from both sides. In strict compliance with the Court of Appeals August 8, 2002, Order, the sole purpose of the hearing was to determine whether the Mobbs Declaration, *standing alone*, was sufficient justification for a person born in the United States to be held without charges, incommunicado, in solitary confinement, and without access to counsel on U.S. soil.

On August 16, 2002, this Court held the Mobbs Declaration insufficient as a matter of law to justify Hamdi's classification as an enemy combatant. Instead of ordering the government to allow the Federal Public Defender access to Hamdi and in the interest of the least intrusive measures

possible, the Court ordered the government to produce the documents previously requested in its July 31, 2002, Order.¹ The Court required the production of the documents by August 21, 2002. To allay any concerns regarding national security implications of the requested documents, the Court ordered the sealed documents be produced ex parte and solely for in camera review.

On August 19, 2002, the Respondents filed a Motion for Certification of Interlocutory Appeal and for Stay. On August 20, 2002, the Court held a telephonic conference with lawyers for both sides to discuss the effect of the motion on the Court's production Order.² The Respondents requested an extension of time for compliance with this Court's August 16, 2002, production Order while the Court considered their latest motion. After considering the matter, the Court ordered Petitioners to file any response to Respondents' Motion by August 21, 2002, and granted the Respondents an extension of time on the production order until August 26, 2002.

Discussion

The Respondents' Motion for Certification of Interlocutory Appeal and for Stay requests that this Court certify the question of whether the Mobbs Declaration, *standing alone*, is sufficient to allow this Court to conduct a meaningful judicial review of Hamdi's classification status. Resp't Mot. for Certification of Interlocutory Appeal and for Stay, at 1 [hereinafter Resp't Mot.]. Under 28 U.S.C. § 1292(b), the Court has the discretion to certify such an appeal from an interlocutory order. Certification is proper if the following criteria are met: (1) the order involves a controlling question

1. The 16 August, 2002, Order also required the Respondents to produce the screening criteria used to make the determination of Hamdi's status as an enemy combatant. The Respondents indicated in its Motion for Certification that it was now willing to turn the criteria over. Resp't Mot. for Certification of Interlocutory Appeal and for Stay, at 2 n.1.

2. All telephonic conferences are with a clerk and a court reporter.

of law; (2) there is substantial ground for difference of opinion regarding the question; and (3) an immediate appeal from the order may materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292(b).

I. The August 16, 2002, Order Involves a Controlling Question of Law

The Respondents' assert that the Court's production Order involves a controlling question of law. As support for this proposition, the respondents' cite the recent Court of Appeals for the Fourth Circuit's statement that "[i]t has long been established that if Hamdi is indeed an 'enemy combatant' who was captured during hostilities in Afghanistan, the government's present detention of him is a lawful one." Resp't Mot., at 2-3 (quoting Hamdi v. Rumsfeld, No. 02-6895, 2002 WL 1483908 (4th Cir. July 12, 2002)). It is unclear what the Court of Appeals meant by this statement and this Court has several reservations regarding the implications of such a finding. First, the Executive's unilateral determination of Hamdi's status appears to violate the protections afforded by the international law of war as expressed in the Geneva Convention Relative to the Treatment of Prisoners of War, to which the United States is a signatory. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 ("GPW"). The GPW requires that any doubt regarding a person's status be determined "by a competent tribunal." Id. at Article 5. There is no evidence from the facts before the Court, limited as they are, that Hamdi's status was determined by a competent tribunal. The Court notes that the GPW never mentions the term "enemy combatant." ABA Task Force on Treatment of Enemy Combatants, Preliminary Report, August 8, 2002, at 7-8 ("Until now, as used by the attorney general, the term "enemy combatant" appeared nowhere in U.S. criminal law, international law or in the law of war.")(internal citations omitted).

The second reservation that the Court has regarding the lawfulness of the Executive's unilateral determination of Hamdi's status is that it appears to violate the joint service regulations governing the detention of captured enemy combatants or others. See Joint Service Regulation, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees (Oct. 1, 1997)(hereinafter Joint Service Regulation). The Joint Service Regulation indicate that where a detainee's status is in doubt, a military tribunal, appointed by the general courts-martial convening authority, must determine whether the detainee is a prisoner of war. Joint Service Regulation 1-6(b)("A competent tribunal shall determine the status of any person not appearing to be entitled to prisoner of war status who has committed a belligerent act or has engaged in hostile activities in aid of enemy armed forces, and who asserts that he or she is entitled to treatment as a prisoner of war, or concerning whom any doubt of a like nature exists."). Here again, there is no evidence before the Court that Hamdi's status was determined by a military tribunal in accordance with the Joint Service Regulation.

In addition to the reservations listed above, the Court points out that any finding that the Executive can unilaterally classify a person born in the United States as an enemy combatant, justify the classification on naked assertions such as those contained in the Mobbs Declaration, and thereby claim the authority to hold the detainee indefinitely, incommunicado, and in solitary confinement may have grave consequences for numerous Supreme Court precedents and their progeny. See Riverside v. McLaughlin, 500 U.S. 44, 56 (1991)(holding that a judicial determination of probable cause is required within 48 hours of person being taken into custody); Miranda v. Arizona, 384 U.S. 436 (1966); Gideon v. Wainwright, 372 U.S. 335 (1963); In re Medley, 134 U.S. 160, 168-71 (1890)(holding that solitary confinement is a form of punishment).

Despite this Court's reservations regarding the lawfulness of the Executive's unilateral determination of Hamdi's status and his resulting indefinite detention, this Court declined to decide these issues in consideration of the Court of Appeals direction that this Court "consider the sufficiency of the Mobbs Declaration as an independent matter before proceeding further." August 8, 2002, Order at 2. As painstakingly set forth in this Court's August 16, 2002, Order, the Court found the Mobbs Declaration insufficient to allow the Court to conduct a meaningful judicial review of Hamdi's classification as an enemy combatant. Among the many shortcomings of the Mobbs Declaration highlighted by the Court, the Court found that the declaration failed to: (1) explain who Mr. Mobbs is and establish his authority to make or review Hamdi's classification as an enemy combatant; (2) establish that the government's classification of Hamdi's status was determined pursuant to appropriate authority to make such determinations; (3) establish that the screening criteria used to make and maintain Hamdi's classification met sufficient procedural requirements as to be consistent with the Fifth Amendment's prohibition against governmental deprivation of life, liberty, or property without due process of law; and (4) explain the governmental determination that Hamdi's continuing detention without charges and without access to counsel serves national security. In light of these omissions, as well as the others set forth in the August 16, 2002, Order, this Court was forced to find the Mobbs Declaration insufficient as a matter of law.

While the Court feels that the Mobbs Declaration is clearly insufficient, *standing alone*, to justify Hamdi's classification, it recognizes that such a decision necessarily implicates the broader question of the degree of deference due to the Executive's determination. In earlier opinions, the Court of Appeals made it clear that the Executive is entitled to a great level of deference. But, the Appeals Court also declined to dismiss the petition, stating "[i]n dismissing ... with no meaningful

judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government's say-so." Hamdi, 2002 WL 1483908, at *5 (4th Cir. July 12, 2002)(emphasis added). In its August 16, 2002, Order, this Court set forth the criteria it believes represent the balance between the appropriate level of deference to the Executive and the meaningful judicial review required under the circumstances. In applying these criteria to the Mobbs Declaration, the Court found the Declaration insufficient. However, given the Court of Appeals statement that if Hamdi is found to be an enemy combatant, then his detention is lawful, it appears that this Court's determination regarding the sufficiency of the Mobbs Declaration is a controlling question of law. If the Court held the Mobbs Declaration sufficient to classify Hamdi as an enemy combatant, then the Court of Appeals has indicated that judicial review of his status is at an end.

II. Substantial Ground Exists for Difference of Opinion

Due to the implications regarding the criteria set forth by the Court to conduct its judicial review of Hamdi's classification, the Court acknowledges that substantial ground exists for a difference of opinion regarding the sufficiency of the Mobbs Declaration. The Court believes that judicial deference to the Executive's authority cannot justify approving of Hamdi's classification as an enemy combatant based solely on the say-so of a "Special Adviser" to the Under Secretary of Defense for Policy. However, given the great deference that the Executive is entitled to in time of hostilities, the Court realizes that reasonable minds may differ in this opinion. This realization is enforced by the Court of Appeals for the Fourth Circuit's emphasis that "[o]ur Constitution's commitment of the conduct of war to the political branches of American government requires the Court's respect at every step." Hamdi, 2002 WL 1483908, at *3 (4th Cir. July 12, 2002).

III. An Immediate Appeal May Materially Advance the Ultimate Termination of the Litigation

If the Court of Appeals determines that this Court's finding regarding the sufficiency of the Mobbs Declaration is erroneous, then such a determination may advance the ultimate termination of the litigation. As previously noted, if the Mobbs Declaration is sufficient proof of Hamdi's status as an enemy combatant, then the Court of Appeals has indicated that further judicial review of his current detention is foreclosed. Despite any reservations this Court may have about this proposition, this Court is bound to follow the dictates of the Court of Appeals for the Fourth Circuit. To fail to do so would stand over 200 years of American jurisprudence on its ear.

If the appellate court affirms this Court's holding that the Mobbs Declaration is insufficient, then this may also materially advance the ultimate termination of the litigation. It has become obvious that the Respondents appear to be prepared to defy this Court's production Order, and, thereby, create a confrontation between the executive and judicial branches of our government. While this Court would like to avoid any such confrontation, it will not abdicate its Constitutional responsibilities to do so. If the Court of Appeals affirms this Court's August 16, 2002, production Order, then this Court hopes that it will give the Respondents pause before embarking on a confrontation that would be harmful to both the Executive and the Judiciary.

The Clerk of the Court is **DIRECTED** to transmit this Order via facsimile and U.S. mail to all counsel or record and to mail a copy to Yaser Esam Hamdi.

IT IS SO ORDERED.

/S/ Robert G. Doumar

UNITED STATES DISTRICT JUDGE

Norfolk, Virginia

August 21st, 2002

8/21/02 Copies Faxed + Mailed Saw